12

Supreme Court, U.S.
FILED
JUL 17 2003
OFFICE OF THE CLERK

No. 02-1315

IN THE

Supreme Court of the United States

GARY LOCKE, Governor of the State of Washington, *et al.*,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

ROBERT H. CHANIN *
ANDREW D. ROTH
LAURENCE GOLD
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

30 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
CONCLUSION	26

TABLE OF AUTHORITIES

CASES — Page

Brusca v. Missouri, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972) ..... *passim*
City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 14
Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 5, 15, 19
Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) 17
Everson v. Board of Educ. of Ewing, 330 U.S. 1 (1947) 19
FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 20-21
Gregory v. Ashcroft, 501 U.S. 452 (1991) 3, 18
Harris v. McRae, 448 U.S. 297 (1980) ..... *passim*
Johnson v. Robison, 415 U.S. 361 (1974) 17
Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 3-4, 22-25
Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 15
Maher v. Roe, 432 U.S. 464 (1977) ..... *passim*
McDaniel v. Paty, 435 U.S. 618 (1978) 3, 16-17
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 8-10
Mueller v. Allen, 463 U.S. 388 (1983) 5
National Endowment for Arts (NEA) v. Finley, 524 U.S. 569 (1998) 23-24
Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983) 12-13
Roe v. Wade, 410 U.S. 113 (1973) 7
Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) 3-4, 22-25
Rust v. Sullivan, 500 U.S. 173 (1991) 12-13
Shapiro v. Thompson, 394 U.S. 618 (1969) 8-10

TABLE OF AUTHORITIES—Continued

Page

Sherbert v. Verner, 374 U.S. 398 (1963) 3, 9-10, 16-17
Sloan v. Lemon, 413 U.S. 825 (1973) 5
United States v. American Library Ass'n, Inc., 123 S. Ct. 2297 (2003) 24, 25
Witters v. State of Wash. Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989) 21
Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 5
Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 5, 19, 20

STATUTES AND CONSTITUTIONAL PROVISIONS

20 U.S.C. § 954(d)(1) 23
Wash. Rev. Code 28B.10.814 4
Wash. Rev. Code 28B.119.010 4
U.S. CONST. amend. I 14-15
WASH. CONST. art. I, § 11 ..... 4, 18, 20-21

MISCELLANEOUS

A Bill for Establishing Religious Freedom, *reprinted in* 5 The Founders' Constitution 84 (P. Kurland & R. Lerner eds. 1987) 18
Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875 (1986) 18-19

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

This brief *amicus curiae* is filed by the National Education Association with the written consent of the parties, as provided for in the Rules of this Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The National Education Association ("NEA") is a nationwide employee organization with more than 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States. As a matter of organizational policy, NEA is opposed to any arrangement pursuant to which public funds are used to pay for students to attend sectarian schools or are otherwise used for religious education. Consistent with this policy, NEA supports state statutory and constitutional provisions—such as those in the State of Washington—that preclude the public funding of religious education, and NEA is committed to defending those provisions against constitutional challenges such as the one brought by the plaintiff-respondent in this case.

SUMMARY OF ARGUMENT

I. The question presented in this case is whether the United States Constitution *requires* a State to fund an individual's religious college education when the State funds secular college education. The answer is "no."

(a) The only case on point that has reached this Court is *Brusca v. Missouri*, 405 U.S. 1050 (1972), summarily and

---

[1] Counsel for a party has not authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or filing of this brief.

unanimously affirming 332 F. Supp. 275 (E.D. Mo. 1971) and the three-judge district court's rejection therein of the "parent-plaintiffs[']claim to be entitled, as a matter of federal constitutional right, to tax-raised funds for the purpose of affording a religious [private school] education to their children" when the State provided children a secular public school education, *id.* at 276-77.

(b) In *Maher v.* Roe, 432 U.S. 464 (1977), this Court rejected the claim that "the Constitution requires a . . . State to pay for nontherapeutic abortions when it pays for childbirth." *Id.* at 466. In so doing, the *Maher* Court set out an analytical framework for judging affirmative-obligation-to-fund-constitutionally-protected-activity claims such as the claim there, the claim in *Brusca* and the claim in this case. Noting that such claims "present[ ] a question arising under the Equal Protection Clause of the Fourteenth Amendment," 432 U.S. at 470, this Court instructed that "[w]e must decide, first, whether [the funding refusal] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [funding refusal] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." *Id.* (internal quotations omitted).

(c) Applying the analytical framework set out in *Maher* to the plaintiff's-respondent's claim in this case that Washington must fund his religious college education when the State funds secular college education, it is plain that the claim fails.

First, a low-income individual desiring a religious education "does not come within the limited category of [suspect] classes so recognized by [this Court's] cases." *Compare Maher*, 432 U.S. at 471-72.

Second, Washington's refusal to fund the plaintiff's-respondent's religious college education does not impinge upon his constitutionally protected right freely to exercise his religion. The funding refusal raises no obstacle to, places no restriction on, and does nothing to increase the difficulty of, obtaining a religious college education, and plaintiff-respondent "suffers no disadvantage as a consequence of [Washington's] decision to fund [secular college education]; [he simply] continues as before to be dependent on private sources for the [religious college education he] desires." *Compare Maher*, 432 U.S. at 474. Because such a funding refusal does not "penalize" the plaintiff's-respondent's constitutional right to the free exercise of religion, cases like *Sherbert v. Verner*, 374 U.S. 398 (1963) and *McDaniel v. Paty*, 435 U.S. 618 (1978) are "inapplicable here." *Compare Maher*, 432 U.S. at 474-75 n.8.

Third, Washington's decision not to provide public funding for religious education—as embodied in Article I, § 11 of its Constitution—is a decision "fraught with judgments of policy and value" that easily passes constitutional muster "under the less demanding test of rationality that applies" to public funding decisions in general and public funding decisions embodied in state constitutional provisions in particular. *Compare Maher*, 432 U.S. at 478-79; *see also Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991). Washington's decision rationally furthers a number of legitimate purposes, including: (i) honoring the Jeffersonian principle that taxpayers should not be compelled to support any religious exercise whatsoever, and its corollary that, with respect to financing, religion should be wholly voluntary and the government should neither help nor interfere; (ii) avoiding religiously based social conflict; and (iii) maintaining religious institutions as independent, self-governing, bodies.

II. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) and *Legal Services Corp. v.*

Velazquez, 531 U.S. 533 (2001) do not support the proposition that Washington's refusal to fund the plaintiff's-respondent's religious college education impinges upon his constitutionally protected right freely to exercise his religion, as the Court of Appeals surmised.

In both cases, the government was deemed to have impinged upon the right of free speech through funding refusals that served to "distort" government funded systems for "facilitat[ing] private speech" by "prohibit[ing] speech necessary to the ['usual' and] proper functioning of those [free speech] systems." *See Velasquez*, 531 U.S. at 542-44.

There is no basis in either *Rosenberger* or *Velasquez*, in any other decision of this Court, in accepted practice, or in reason, for the proposition that where, as here, a State decides to establish a college scholarship program, the State is required to publicly fund study in all the myriad fields of higher education, and that its determination not to fund religious college education "distorts" the overall scholarship program or interferes with "the usual and proper functioning of " the program.

ARGUMENT

The State of Washington Promise Scholarship Program awards publicly funded scholarships to eligible students pursuing a college degree. *See* Wash. Rev. Code 28B.119.010. At the same time—consonant with Article I, § 11 of the Washington Constitution which states that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction . . ."—the Washington Program provides that "scholarships may not be awarded to any student who is pursuing a degree in theology," Wash. Rev. Code 28B.119.010(b)(8). *See also* Wash. Rev. Code 28B.10.814 ("No aid shall be awarded to any student who is pursuing a degree in theology.").

The plaintiff-respondent in this case challenges Washington's refusal to fund his religious college education when the State funds secular college education as violative of the United States Constitution. That challenge fails—as we now show.

I.

In general, the Bill of Rights to the United States Constitution places negative constraints on actions by the government—including governmental action to facilitate a private individual's activity—but does not place affirmative obligations on the government to take action—either to facilitate a private individual's activity or otherwise.

Not surprisingly, then, this Court has on numerous occasions during the last half-century been faced with some variation of the "difficult question[ ]," *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 485 (1986), of whether the Constitution *prohibits* a State from funding an individual's religious private school education. *See Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters*, *supra*; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

It is equally unsurprising that, during this same period, the Court has had only one case raising the entirely different question of whether the Constitution *requires* a State to fund an individual's religious private school education. That case was *Brusca v. Missouri*, 405 U.S. 1050 (1972), in which a three-judge district court had unanimously rejected the "parent-plaintiffs[']claim to be entitled, as a matter of federal constitutional right, to tax-raised funds for the purpose of affording a religious [private school] education to their children" when the State provided children a secular public school education. *See* 332 F. Supp. 275, 276-77 (E.D. Mo. 1971). This Court did not find the question presented in that

case to be a difficult one: it summarily, and unanimously, affirmed the decision of the lower court.

As is the norm, the summary affirmance in *Brusca* was not accompanied by an opinion setting out the Court's basis for rejecting the affirmative-obligation-to-fund-constitutionally-protected-activity claim in that case. But shortly thereafter, the analytical framework for judging such claims was set out in detail in Justice Powell's opinion for the Court in *Maher v. Roe*, 432 U.S. 464 (1977). The *Maher* Court set out that analyses in rejecting the claim—indistinguishable for present purposes from the claim asserted in *Brusca* and in the instant case—that "the Constitution *requires* a participating State [in the joint federal-state Medicaid program] to pay for nontherapeutic abortions when it pays for childbirth." *Id.* at 466 (emphasis added). The *Maher* analysis confirms the conclusion reached in *Brusca*, and leads to the same conclusion here.

II.

Maher involved a Connecticut Medicaid regulation providing that the State would fund the medical expenses of indigent women incident to childbirth, but would *not* fund the medical expenses of indigent women incident to nontherapeutic abortions. The plaintiffs in *Maher* challenged the constitutionality of the State's regulation on the theory "that Connecticut must accord equal treatment to both abortion and childbirth, and may not evidence a policy preference by funding only the medical expenses incident to childbirth." 432 U.S. at 470.

"This challenge," the *Maher* Court stated, "presents a question arising under the Equal Protection Clause of the Fourteenth Amendment." 432 U.S. at 470. "The basic framework of analysis of such a claim," the Court noted, "is well settled":

> "We must decide, first, whether [the funding refusal] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [funding refusal] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination . . . ." [*Id.* (quoting *San Antonio School Dist. v. Rodriquez*, 411 U.S. 1, 17 (1973)) (ellipsis by Court).]

The Court then followed this framework in analyzing the *Maher* plaintiffs' claim.

1. The *Maher* Court first considered and found utterly wanting the suggestion that Connecticut's refusal to fund nontherapeutic abortions "operate[d] to the disadvantage of some suspect class," 432 U.S. at 470, stating that "[a]n indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases," *id.* at 470-71. "[T]he fact that the impact of the [Connecticut] regulation falls upon those who cannot pay," the Court added, does not "lead to a different conclusion." *Id.* at 471.

2. The *Maher* Court then turned to what it characterized as "the central question in this case"—*i.e.*, whether the Connecticut regulation refusing to fund nontherapeutic abortions impinged upon the fundamental right to an abortion protected by the Due Process Clause of the Fourteenth Amendment as recognized in *Roe v. Wade*, 410 U.S. 113 (1973). *See Maher*, 432 U.S. at 471.

And, the Court answered this "central question" in the negative:

> The Connecticut regulation [refusing to fund nontherapeutic abortions] places *no* obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers *no* disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be

> dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative [by funding medical expenses incident thereto], thereby influencing the woman's decision, but it has imposed *no* restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. [432 U.S. at 474 (emphasis added).]

Simply put, the Connecticut funding regulation did not impinge upon the constitutionally protected right to an abortion because the regulation raised no obstacle to, placed no restriction on, and did nothing to increase the difficulty of, obtaining an abortion—in a word, the State's no-public-funding determination created no disadvantage for women desiring an abortion.

In so holding, the *Maher* Court rejected as "misplaced" the plaintiffs' reliance on the Court's prior decisions in *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), in which "durational residence requirements for the receipt of public benefits were found to be unconstitutional because they 'penalized' the exercise of the constitutional right to travel interstate." 432 U.S. at 474 n.8. The Court explained:

> . . . Penalties are most familiar to the criminal law, where criminal sanctions are imposed as a consequence of proscribed conduct. *Shapiro* and *Maricopa County* recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.
>
> If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro*, and strict scrutiny might

> be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. [*Id.* at 474-75 n.8.]

The *Maher* Court tersely added that "*Sherbert v. Verner*, 374 U.S. 398 (1963), similarly is inapplicable here." 432 U.S. at 474-75 n.8. But the Court's decision in *Harris v. McRae*, 448 U.S. 297 (1980)—rejecting a federal constitutional challenge to the so-called "Hyde Amendment," which limits Medicaid's provision authorizing the funding of medically necessary services generally by denying authorization for the funding of certain medically necessary abortions—elaborates at some length on why *Sherbert* "similarly is inapplicable":

> A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert v. Verner*, 374 U.S. 398, where this Court held that a State may not, consistent with the First and Fourteenth Amendments, withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath. But the Hyde Amendment, unlike the statute at issue in *Sherbert*, does not provide for such a broad disqualification from receipt of public benefits. Rather, the Hyde Amendment, like the Connecticut welfare provision at issue in *Maher*, represents simply a refusal to subsidize certain protected conduct. [448 U.S. at 317 n.19 (emphasis in original).]

The nub of the matter, said the *Harris* Court, is this: "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Id.* at 317 n.19. And, the rulings in *Sherbert v. Verner*, *Shapiro v. Thompson* and *Memorial Hospital v. Maricopa County* are for this reason wholly consistent with the rulings in *Maher* and its progeny—*i.e.*, that an equal protection affirmative-obligation-to-fund-constitutionally-protected-activity claim is *not* subject to a strict scrutiny analysis.

3. Having answered "no" to the first two questions posed by the *Maher* plaintiffs' constitutional claim, the Court turned to the "question [that] remains"—*i.e.*, whether "the Connecticut funding scheme" passes constitutional muster "under the less demanding test of rationality that applies in the absence of a suspect classification or the impingement of a fundamental right." 432 U.S. at 478. The Court answered this question "yes."

The Court began by setting out the standard for evaluation:

> Our cases uniformly have accorded the States a wide[ ] latitude in choosing among competing demands for limited public funds. In *Dandridge v. Williams*, 397 U.S. [471,] 485 [(1970)], despite recognition that laws and regulations allocating welfare funds involve "the most basic economic needs of impoverished human beings," we held that classifications survive equal protection challenge when a "reasonable basis" for the classification is shown. [432 U.S. at 479 (footnote omitted).]

Applying this standard to Connecticut's regulation, the Court concluded that the regulation did have a "reasonable basis": "[T]he state interest in encouraging normal childbirth [in lieu of nontherapeutic abortion] exceeds this minimal level." 432 U.S. at 479. In this regard, the Court emphasized that where the decision of whether to fund *vel non* involves

sensitive considerations of policy and value, that decision is committed to the legislature with only the most limited and deferential judicial review:

> The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down laws because they may be unwise, improvident, or out of harmony with a particular school of thought. Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. [*Id.* at 479 (internal quotations, citations and footnote omitted).]

4. The general principle that governs affirmative-obligation-to-fund-constitutionally-protected-activity claims is most succinctly stated in *Harris v. McRae*: "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." 448 U.S. at 317-18. As the *Harris* Court explained:

> To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, *Griswald v. Connecticut*, 381 U.S. 479, or prevent parents from sending their child to a private school, *Pierce v. Society of Sisters*, 268 U.S. 510, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require

> Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. [*Id.* at 318.]

And, as the *Harris* Court concluded: "Nothing in the Due Process Clause supports such an extraordinary result. *Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.*" *Id.* (emphasis added) (footnote omitted).

Subsequent to *Harris*, the Court has applied this principle to reject affirmative-obligation-to-fund-constitutionally-protected-activity claims in *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) and *Rust v. Sullivan*, 500 U.S. 173 (1991).

Regan involved a constitutional challenge to Congress' refusal to grant a tax exemption to charitable organizations engaged in substantial lobbying when Congress had granted a tax exemption to veterans' organizations engaged in such lobbying. The Court rejected this challenge, stating:

> We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. *Buckley v. Valeo*, 424 U.S. 1 (1976), upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny. *Id.*, at 93-108. *Harris v. McRae, supra*, and *Maher v. Roe*, 432 U.S. 464 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes. [461 U.S. at 549.]

And, as the *Regan* Court added:

> The reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Harris*, 448 U.S., at 316. Although [respondent] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.*, at 318. [461 U.S. at 549-50 (ellipsis by Court).]

Rust, in its turn, involved a constitutional challenge to Congress' refusal to fund private counseling "concerning the use of abortion as a method of family planning" when Congress provided funds for private family planning services generally. The Court rejected this challenge as well:

> Petitioners' assertions ultimately boil down to the position that, if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. *Regan v. Taxation with Representation of Wash.*, *supra*; *Maher v. Roe*, *supra*; *Harris v. McRae*, *supra*. Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program. [500 U.S. at 194.]

III.

In this case, the plaintiff-respondent claims that Washington is required to fund his religious college education when the State funds secular college education. Like the claims of the *Maher*, *Harris*, *Regan* and *Rust* plaintiffs, this claim "presents a question arising under the Equal Protection Clause of the Fourteenth Amendment." *Maher*, 432 U.S. at

470. Applying the "well settled" framework for analyzing such claims, *id.*, the plaintiff's-respondent's claim fails—just as those plaintiffs' claims were held to fail.

1. The Court never has recognized individuals desiring a religious education as a "discrete and insular minority" that constitutes a suspect class. There is no basis in reason or experience for "deem[ing]" laws that do not provide public funding to individuals desiring a religious education as laws "reflect[ing] prejudice and antipathy" against a "politically powerless" class that lacks the means to prevent or "rectif[y]" discrimination against the class through normal democratic processes. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 445 (1985).

That being so, it follows from the *Maher* Court's holding that "[a]n indigent woman desiring an abortion does not come within the limited category of [suspect] classes so recognized by [the Court's] cases," 432 U.S. at 470-71, and the *Cleburne* Court's holding that mentally retarded persons are not a suspect class, *see* 473 U.S. at 439-47, that low-income individuals desiring a religious education are *not* a suspect class.

2. Thus, "the central question" in this case—*i.e.*, whether Washington's refusal to fund the plaintiff's-respondent's religious college education "impinges upon a fundamental right explicitly or implicitly protected by the Constitution"—parallels "the central question" in *Maher*. *See* 432 U.S. at 470 (internal quotations omitted). And, as in *Maher*, the answer is "no."

a. The Free Exercise Clause of the First Amendment—as made applicable to the States through the Fourteenth Amendment—provides that a State "shall make no law . . . *prohibiting* the free exercise [of religion]." U.S. CONST.

amend. I (emphasis added). As the Court explained in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988):

> The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert, supra*, [374 U.S.] at 412 (Douglas, J., concurring). [485 U.S. at 451.]

Accordingly, a State can not *prohibit* individuals from securing through their own means a religious education for themselves or their children. *See Nyquist, supra*, 413 U.S. at 788 ("[A] state law interfering with a parent's right to have a child educated in a sectarian school would run afoul of the Free Exercise Clause.").

At the same time, as the three-judge district court in *Brusca* put it: "[A] parent's right to choose a religious private school for his children may not be equated with a right to insist that the state is compelled to finance his child's non-public school education in whole or in part in order that he may obtain a religious education." 332 F. Supp. at 277. Accordingly, "the Religion Clauses of the First Amendment . . . *do not require* that [financial aid] be given by the State" to "assist a parent in educating his child religiously." *Id.* at 279 (emphasis added).

To apply the *Maher* Court's words to the matter at hand:

> The [Washington Promise Scholarship Program's refusal to fund religious college education] places *no* obstacles—absolute or otherwise—in the [low income individual's] path to [a religious college education.] [A low income individual] who desires [a religious college education] suffers *no* disadvantage as a consequence of [Washington's] decision to fund [secular college education]; [he/she simply] continues as before to be dependent on private sources for the [religious college education he/she] desires. The State may have made

> [secular college education] a more attractive alternative [by funding it], thereby influencing the [individual's] decision, but it has imposed *no* restriction on access to [religious college education] that was not already there. The [financial constraints] that may make it difficult—and in some cases, impossible—for some [individuals to obtain a religious college education] is neither created nor in any way affected by the [Washington Promise Scholarship Program]. [432 U.S. at 474 (emphasis added).]

b. The Court of Appeals invoked this Court's decision in *McDaniel v. Paty*, 435 U.S. 618 (1978), but that decision is not even apposite here—much less in conflict with *Maher* and its progeny.

The *McDaniel* Court held that "a Tennessee statute barring 'Minister[s] of the Gospel, or priest[s] of any denomination whatever' from serving as delegates to the State's limited constitutional convention deprived appellant McDaniel, an ordained minister, of the right to the free exercise of religion." 435 U.S. at 620 (plurality opinion). The Court rested that holding squarely on *Sherbert v. Verner*, *supra*. As the *McDaniel* plurality explained: "'[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] *effectively penalizes the free exercise of [his] constitutional liberties*." 435 U.S. at 626 (quoting *Sherbert*, 374 U.S. at 406) (emphasis added); *accord* 435 U.S. at 633 (Brennan, J., concurring).

But as *Maher* and *Harris v. McRae* make abundantly clear, *Sherbert* and its progeny such as *McDaniel*—and their underlying "penalty analysis"—do *not* apply where, as here, the challenged state action is *a refusal to fund a protected religious activity* rather than a refusal to provide a secular benefit (as it were) to a person because that person is, or has,

engaged in protected religious activity. In constitutional terms, there is a world of difference between a State's refusal to provide public funding for an individual's training for the priesthood or the ministry, consistent with *Maher* and its progeny; and a State's refusal to provide a secular benefit to a priest or a minister because of that individual's religious status or activities, contrary to *Sherbert* and *McDaniel*.

As the *Harris* Court succinctly put it: "A refusal to fund protected activity, without more, *cannot be* equated with the imposition of a 'penalty' on that activity." 448 U.S. at 317 n.19 (emphasis added).[2]

3. The "question that remains" is whether Washington's refusal to fund an individual's religious college education when the State funds secular college education passes constitutional muster "under the less demanding test of rationality that applies in the absence of a suspect classification or the impingement of a fundamental right." *Compare Maher*, 432 U.S. at 478. The answer to this question is "yes."

In addressing this question, we begin with the point that the Washington Promise Scholarship Program's refusal to provide funding for religious college education is consonant

---

[2] Against this case law background, the Court's cryptic statement in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 886 n.3 (1990) that the Court "strictly scrutinize[s] governmental classifications based on religion, see *McDaniel v. Paty*, 435 U.S. 618 (1978)," must be taken to mean that the Court strictly scrutinizes governmental classifications based on religion where—as in *McDaniel* but unlike here—the classification impinges upon the fundamental right to the free exercise of religion. *Accord Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold in Part III, *infra*, that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.").

with—and is plainly intended to give effect to—Article I, § 11 of the Washington Constitution:

> *No* public money or property shall be appropriated for or applied to any religious worship, exercise *or instruction*, or the support of any religious establishment. [WASH. CONST. art. I, § 11 (emphasis added), *reprinted in* Pet. App. at 88a.]

This Court's "reluctan[ce]" to overturn a governmental action that "burdens neither a suspect group nor a fundamental interest" becomes greater still where that governmental action is mandated by "a state constitutional provision approved by the people of [the State] as a whole." *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991). Such a governmental action will not be found to violate the United States Constitution

> "unless the varying treatment of different groups or persons [in the state constitutional provision] is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational." [*Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).]

It cannot be gainsaid that Washington's policy decision—as embodied in Article I, § 11 of its Constitution—not to fund religious education with taxpayer dollars is supported by a number of "legitimate purposes," any one of which standing alone suffices to establish the "rationality" of that decision.

One legitimate purpose is to honor both the Jeffersonian principle that no taxpayer should "be compelled to . . . support any religious worship, place, or ministry whatsoever," *see* A Bill for Establishing Religious Freedom, *reprinted in* 5 The Founders' Constitution 84 (P. Kurland & R. Lerner eds. 1987), and its corollary that "[w]ith respect to money, religion [should] be wholly voluntary[;] [c]hurches either [should] support themselves or . . . not, but the government

[should] neither help or interfere," *see* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 923 (1986).

A second legitimate purpose is "avoiding religiously based social conflict" of the kind described in Justice Breyer's dissenting opinion in *Zelman v. Simmons-Harris*, *supra*, 536 U.S. at 717-29. *See also e.g. Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting) ("Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another.").

And yet a third legitimate purpose is to maintain religious institutions as independent, self-governing bodies, and to avoid their transformation into institutions that must be regulated in the way government-funded entities generally are regulated. "When government aid goes up, so does reliance on it; the only thing likely to go down is independence." *Zelman v. Simmons-Harris*, *supra*, 536 U.S. at 715 (Souter, J., dissenting).

All this being so, the three-judge district court in *Brusca* surely was right in concluding that there was nothing "arbitrary," "unreasonable" or "invidious" in "the determination of the State [of Missouri in its Constitution and implementing statutes] to deny its funds to sectarian schools or for religious instruction." 332 F. Supp. at 279.

By any measure, "[t]he decision whether to expend state funds" on religious education is no less "fraught with judgments of policy and value over which opinions are sharply divided" than "[t]he decision whether to expend state funds" on abortion. *See Maher*, 432 U.S. at 479; *compare Nyquist*, *supra*, 413 U.S. at 797 (noting that the issue "of Church-State relationships" underlying the decision whether to fund religious education—and, if so, on what basis—is both a "divisive" and "deeply emotional" one).

Accordingly, the "wide[] latitude" afforded States "in choosing among competing demands for limited public funds," *Maher*, 432 U.S. at 479, is no less appropriate in the present context than it is in the public funding of abortion context. "[W]hen an issue involves policy choices as sensitive as those implicated by public funding of [religious education]"—and when, as here, the policy choice *not* to fund religious education is embodied in a state constitutional provision—"the appropriate forum . . . in a democracy" for seeking to overturn that policy choice is the state constitutional amendment process and not the judicial process. *Compare id.*

To be sure, implicit in this Court's decision in *Zelman v. Simmons-Harris*, *supra*, is the understanding that the Founders were not of the view that the separation-of-church-and-state considerations enumerated above required a federal constitutional provision precluding any and all uses of public money to fund religious education.

But nothing in *Zelman* can be read to stand for the proposition that the First Amendment's Religion Clauses contain any mandate that the States must fund religious education that overrides state constitutional provisions such as Washington's Article I, § 11.

Nor can anything in *Zelman* be read to suggest that the framers of a state constitution and the people in ratifying that state constitution would be *irrational* in concluding that separation-of-church-and-state considerations do warrant a state constitutional provision—like Washington's Article I, § 11—precluding any and all uses of public money to fund religious education.[3]

[3] Although the Equal Protection Clause inquiry does not turn on whether any, some or all of the separation-of-church-and-state considerations enumerated above "actually motivated" the authors of Article I, § 11 of the Washington Constitution and the people of Washington who ratified that Constitution, *see FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), we would be remiss if we failed to note that the Jeffersonian principle of respect for freedom of conscience loomed large in this regard. Article 1, § 11 is revealingly entitled "Religious Freedom," and it makes specific reference to "the liberty of conscience *hereby secured*." *See* Pet. App. at 88a (emphasis added). Unsurprisingly, then, the Washington Supreme Court has characterized Article I, § 11 as a provision the purpose and effect of which is to "prohibit[ ] [Washington] taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Witters v. State of Wash. Comm'n for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989).

4. What the foregoing shows is that the three-step analysis detailed in *Maher* leads ineluctably to the conclusion that a State which provides funding for secular college education is *not* required by the Constitution also to provide funding for religious college education. The sum of the matter in *Harris v. McRae* is the sum of the matter here:

> To hold otherwise would mark a drastic change in [the Court's] understanding of the Constitution. . . . To translate the limitation on governmental power [stated in the Free Exercise Clause] into an affirmative funding obligation would require [a State] to subsidize [an individual's religious education] even if [the State would not fund that same individual's secular education]. Nothing in [the Free Exercise Clause] supports such an extraordinary result. *Whether* [*the freedom to obtain a religious education for oneself or one's children*] *that is constitutionally protected warrants subsidization is a question for* [*each State*] *to answer* [*for itself*], *not a matter of* [*federal*] *constitutional entitlement.* [448 U.S. at 317-18 (emphasis added) (footnote omitted).]

IV.

The Court of Appeals read the decisions in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) and *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) as eroding the *Maher/Harris/Regan/Rust* principle that a rationally-based governmental refusal to fund an individual's exercise of a constitutionally protected right does *not* impinge upon that right. And, based on that reading, the court below concluded that Washington's refusal to fund the plaintiff's-respondent's religious college education impinges upon his constitutionally protected right freely to exercise his religion. *See* Pet. App. at 18a-22a.

That is not a tenable reading of *Rosenberger* and *Velasquez*. Those decisions do not call into question the general principle stated in *Maher* and its progeny, or the applicability of that general principle to Washington's refusal to fund the plaintiff's-respondent's religious college education. To the contrary, as we detail below, *Rosenberger* and *Velasquez* constitute a carefully-defined, narrowly-delineated, exception to the *Maher/Harris/Regan/Rust* principle that covers one particular kind of viewpoint-based refusal to fund private speech but does not even go so far as to reach other refusals to fund private speech—much less so far as to reach refusals to fund religious private education.

1. In both *Rosenberger* and *Velasquez*, the government was deemed to have impinged upon the right of free speech through funding refusals that served to "distort" government funded systems for "facilitat[ing] private speech" by "prohibit[ing] speech necessary to the ['usual' and] proper functioning of those [free speech] systems." *See Velasquez*, 531 U.S. at 542-44.

a. In *Rosenberger*, the Court held that the University of Virginia impinged upon the First Amendment right of free speech by creating a limited (financial) public forum for the

expression of "a diversity of views from private speakers," and—in an action the Court deemed inconsistent with the basic free speech postulate of public forum law prohibiting viewpoint discrimination—refusing to fund speakers expressing a particular (*i.e.*, religious) view. *See* 515 U.S. at 834.

In *National Endowment for Arts (NEA) v. Finley*, 524 U.S. 569 (1998), the Court confirmed *Rosenberger's* narrow compass in upholding 20 U.S.C. § 954(d)(1)'s mandate that NEA "take . . . decency and respect for . . . [American] values [into account in funding the arts]" against a facial challenge to the provision as violative of "the First Amendment's prohibition on viewpoint-based restrictions on protected speech," *id.* at 579. The Court rejected the *Finley* plaintiffs' "reliance on our decision in *Rosenberger*" as "misplaced," commenting that

> the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations that were "'related to the educational purpose of the University,'" [515 U.S.], at 824—and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater. [524 U.S. at 586.]

And, as the *Finley* Court added:

> [A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. . . . And as we held in *Rust*, Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."

> 500 U.S., at 193. *In doing so, "the Government has not discriminated on the basis of viewpoint, it has merely chosen to fund one activity to the exclusion of the other."* *Ibid.* [524 U.S. at 587-88 (emphasis added).]

Thus, even where the constitutionally protected right at issue is the right of free speech, the principle that rationally-based governmental refusals to fund the exercise of a protected right do not impinge upon that right remains the governing general principle, and *Rosenberger* applies only in the confines of governmentally funded public fora. *See also Finley*, 524 U.S. at 598-99 (Scalia, J., concurring) ("*Rosenberger*, as the Court explains, *ante*, at 586, found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum."). *Accord United States v. American Library Ass'n, Inc.*, 123 S. Ct. 2297, 2305 (2003) (plurality opinion) ("In *Rosenberger*, . . . [w]e held that the fund had created a limited public forum by giving public money to student groups who wished to publish, and therefore could not discriminate on the basis of viewpoint.").

b. *Velasquez*, in turn, involved a legal services program established by Congress to provide funding for attorneys to represent indigent plaintiffs in certain types of litigation against the government—including welfare benefits litigation. The Court held that Congress impinged upon the First Amendment right of free speech when—in an action deemed by the Court to be inconsistent with the basic free speech postulate of the litigation system—Congress refused to fund welfare benefits litigation in which the legal services attorneys would in "the ordinary course of [the] litigation" seek to present "arguments and theories Congress finds unacceptable but which by their very nature are within the province of the courts to consider." 531 U.S. at 546, 548.

The *Velasquez* Court made it plain, however, that "when [Congress funds a legal services program] it [is] not required to fund the whole range of legal representations or relationships." 531 U.S. at 548. Congress can, as it has, fund certain classes of litigation—such as welfare benefits litigation—and refuse to fund others such as "most criminal proceedings and . . . litigation involving nontherapeutic abortions, secondary school desegregation, military desertion, or violations of the Selective Service statute." *Id.* at 537.

In all of these regards, the governing general principle is that rationally-based governmental decisions not to fund the exercise of a constitutionally protected right do *not* impinge upon that right. *Accord American Library Ass'n*, 123 S. Ct. at 2309 (plurality opinion) (applying that general principle to reject a First Amendment free speech challenge to congressional restrictions on the funding of public libraries, and distinguishing *Velasquez* as a case where "[t]he Court concluded that the restriction on [the arguments that legal services attorneys could make in] welfare disputes would distort the usual functioning of the legal profession and the federal and state courts before which the lawyers appeared").

2. In sum, *Rosenberger* and *Velasquez* do not even speak to the question of whether a governmental refusal to fund an individual's religious education impinges upon the protected right freely to exercise religion—much less support the conclusion that Washington's refusal to fund the plaintiff's-respondent's religious education impinges upon his free exercise right.

There is no basis in either *Rosenberger* or *Velasquez*, in any other decision of this Court, in accepted practice, or in reason, for the proposition that when government decides to establish a scholarship program at a particular level of education—*e.g.*, the college level, as here—it is required to publicly fund study in all the myriad fields of education at that level, and that its determination not to fund religious education "distorts" the overall scholarship program or interferes with "the usual and proper functioning of" that program.

To the contrary, as we have shown, a governmental refusal to publicly fund religious college education when the government provides funding for secular college education is a rationally-based policy decision in a highly sensitive area that passes constitutional muster.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

ROBERT H. CHANIN *
ANDREW D. ROTH
LAURENCE GOLD
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

* Counsel of Record